

**WIRTZ LAW APC**

Richard M. Wirtz (SBN 137812)

[rwirtz@wirtzlaw.com](mailto:rwirtz@wirtzlaw.com)

Amy R. Smith (SBN 286128)

[asmith@wirtzlaw.com](mailto:asmith@wirtzlaw.com)

4370 La Jolla Village Drive, Suite 800

San Diego, California 92122

Telephone: 858.259.5009

**KNIGHT LAW GROUP LLP**

Steve Mikhov (SBN 224676)

1801 Century Park East, Suite 2300

Los Angeles, CA 90067

Telephone: (310) 552-2250

Attorneys for Plaintiff,  
LORENA GODINEZ

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

LORENA GODINEZ,

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC,  
a Delaware Limited Liability Company;  
and DOES 1 through 10, inclusive,

Defendants.

Case No.: 2:17-CV-05072-ODW-RAO

**PLAINTIFF'S MEMORANDUM  
OF CONTENTIONS OF FACT  
AND LAW**

1 Plaintiff LORENA GODINEZ (“Plaintiff”) submits her Memorandum of  
2 Contentions of Fact and Law in accordance with Local Rule 16-4.

3 **I. SUMMARY OF PLAINTIFF’S CLAIMS**

4 **A. CLAIM 1:** Defendant BMW of North America, LLC (“BMW NA”)
 5 breached the express warranties that accompanied the sale of the 2010 328i
 6 (“vehicle”) to Plaintiff, thereby violating the Song-Beverly Consumer Warranty Act
 7 (“the Act”), California Civil Code § 1790 et seq.;

8 **B. CLAIM 2:** BMW NA breached the implied warranties that
 9 accompanied the sale of the vehicle to Plaintiff, thereby violating the Act, California
 10 Civil Code § 1790 et seq.;

11 **C. CLAIM 3:** BMW NA violated the Act, Civil Code section 1793.2(b)
 12 by failing to repair the vehicle to conform to warranty within 30 days.

13 **II. THE ELEMENTS OF PLAINTIFF’S CLAIMS**

14 Claim 1: BMW NA breached the express warranties that accompanied the
 15 sale of vehicle to Plaintiff, thereby violating the Act, California
 16 Civil Code § 1790 et seq.

17 Plaintiff claims that BMW NA breached the express warranties that
 18 accompanied the sale of the vehicle and the Act because the vehicle had defect(s)
 19 covered by the warranties that substantially impaired the use, value, or safety of the
 20 vehicle, and BMW NA failed to promptly repurchase or replace the vehicle after a
 21 reasonable number of repair opportunities. To establish this claim, Plaintiff must
 22 prove the following:

23 (1) That Plaintiff bought a new motor vehicle distributed by BMW NA;

24 (2) That BMW NA gave Plaintiff a written warranty;

25 (3) That the vehicle had one or more defects covered by the warranty that
 26 substantially impaired its use, value, or safety to a reasonable person in
 27 Plaintiff’s situation;

1 (4) That Plaintiff delivered the vehicle to BMW NA's authorized repair  
2 facilities for repair of the defect(s);

3 (5) That BMW NA or its authorized repair facility failed to repair the vehicle  
4 to match the written warranty after a reasonable number of opportunities to  
5 do so; and

6 (6) That BMW NA did not promptly replace or buy back the vehicle.

7 Judicial Council of California Civil Jury Instructions No. 3201 (Sept. 2018).

8 Additionally, Plaintiff claim that BMW NA is liable for civil penalty damages  
9 because it willfully violated the Act by failing to promptly offer to repurchase or  
10 replace the vehicle. (Judicial Council of California Civil Jury Instructions No. 3244  
11 (Sept. 2018).) "Willful" means that BMW NA knew of its legal obligations and  
12 intentionally declined to follow them. (Id.)

13 Each time the vehicle was given to BMW NA or its authorized repair facility  
14 (dealership) for repair counts as an opportunity to repair, even if BMW NA or its  
15 representative did not do any repair work. (Judicial Council of California Civil Jury  
16 Instructions No. 3202 (Sept. 2018); *see Silvio v. Ford Motor Co.* 109 Cal.App.4th  
17 1205, 1208 (2003).)

18 California Civil Code section 1793.2, subd. (d) provides, in part:  
19

20 (1) Except as provided in paragraph (2), if the manufacturer or its  
21 representative in this state does not service or repair the goods to  
22 conform to the applicable express warranties after a reasonable number  
23 of attempts, the manufacturer shall either replace the goods or  
reimburse the buyer. . . .

24 (2) If the manufacturer or its representative in this state is unable to  
25 service or repair a new motor vehicle . . . to conform to the applicable  
26 express warranties after a reasonable number of attempts, the  
27 manufacturer shall either promptly replace the new motor vehicle . . .  
28 or promptly make restitution to the buyer.

"[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' Whether or not the manufacturer's agents choose to take advantage of the opportunity or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Oregel v. American Isuzu Motors, Inc.* 90 Cal.App.4th 1094, 1103-1104 (2001), internal citation omitted.) "Section 1793.2(d) requires the manufacturer to afford the specified remedies of restitution or replacement if that manufacturer is unable to repair the vehicle 'after a reasonable number of attempts.' 'Attempts' is plural. The statute does not require the manufacturer to make restitution or replace a vehicle if it has had only one opportunity to repair that vehicle." (*Silvio v. Ford Motor Co.* 109 Cal.App.4th 1205, 1208 (2003).) "Whether the impairment is substantial is determined by an objective test, based on what a reasonable person would understand to be a defect. This test is applied, however, within the specific circumstances of the buyer." (*Lundy v. Ford Motor Co.* 87 Cal.App.4th 472, 478 (2001), internal citations omitted.) "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel v. American Honda Motor Co.* 34 Cal.App.4th 1242, 1250 (1995), internal citations omitted.)

Claim 2: BMW NA breached the implied warranties that accompanied the sale of the vehicle to Plaintiff, thereby violating the Act, Civil Code § 1790 *et seq.*

Plaintiff claims that BMW NA breached the implied warranties that accompanied the sale of the vehicle when it sold the vehicle with a defect, thereby violating the Act. To establish this claim, Plaintiff must prove the following:

(1) That Plaintiff bought a new motor vehicle distributed by BMW NA;

1 (2) That at the time of purchase BMW NA was in the business of  
 2 distributing and selling vehicles; and

3 (3) That the vehicle was (i) not of the same quality as those generally  
 4 acceptable in the trade; or (ii) not fit for the ordinary purpose for  
 5 which such goods are used.

6 Judicial Council of California Civil Jury Instructions No. 3210 (Sept. 2018).

7 Every sale of consumer goods sold at retail in this state shall be accompanied  
 8 by the manufacturer's and the retail seller's implied warranty that the goods are  
 9 merchantable. (Civ. Code, § 1792.) The implied warranty of merchantability applies  
 10 to the condition of the vehicle at the time of sale, but latent defects can be discovered  
 11 beyond the one-year duration of that warranty. (*Mexia v. Rinker Boat Co., Inc.* (App.  
 12 4 Dist. 2009) 174 Cal.App.4th 1297.) The notification requirements under the  
 13 Uniform Commercial Code section 2601 and 2602 do not apply to cases brought  
 14 under the Act. (*Krotin v. Porsche Cars North America, Inc.* 38 Cal.App.4th 294,  
 15 300-02 (1995).)

16 Civil Code section 1794, subd. (a) provides: "Any buyer of consumer goods  
 17 who is damaged by a failure to comply with any obligation... under an implied...  
 18 warranty...may bring an action for the recovery of damages and other legal and  
 19 equitable relief." The measure of the buyer's damages in an action under this section  
 20 [1794] shall include the rights of replacement or reimbursement as set forth in  
 21 Section 1793.2, subd. (d) and where the buyer has rightfully rejected or justifiably  
 22 revoked acceptance of the goods or has exercised any right to cancel the sale,  
 23 Sections 2711 – 2713 of the Commercial Code shall apply. (Civ. Code, §§ 1794,  
 24 subds. (b) and (b)(1).)

25 There is no requirement that to recover on a claim for breach of the implied  
 26 warranty of merchantability under the Act, the consumer must bring the vehicle to  
 27 the manufacturer's authorized repair facility for repair of the defect. (CACI No.  
 28 3210; *Brand v. Hyundai Motor America* 226 Cal.App.4th 1538, 1545 (2014); *Mocek*

1 *v. Alfa Leisure, Inc.* 114 Cal.App.4th 402, 406-08 (2003).)

2  
3 Claim 3: BMW NA violated the Act, Civil Code section 1793.2(b) by  
4 failing to repair the vehicle to conform to warranty within 30  
5 days.

6 To establish this claim, Plaintiff must prove the following:

- 7 (1) That Plaintiff bought a new motor vehicle distributed by BMW NA;  
8 (2) That BMW NA gave Plaintiff a written warranty;  
9 (3) That the new motor vehicle had defect(s) that were covered by the  
10 warranty;  
11 (4) That BMW NA or its authorized repair facility failed to complete  
12 repairs within 30 days so as to conform to the applicable warranties.

13 See Judicial Council of California Civil Jury Instructions § 3205 (Sept.  
14 2018).

15 Plaintiff pleads that she was a buyer injured by “Civil Code section 1793.2,  
16 subdivision (b) which in pertinent part requires that with respect to consumer  
17 goods sold in this state for which the manufacturer has made an express warranty  
18 and service and repair facilities are maintained in this state (undisputed herein) and  
19 ‘repair of the goods is necessary because they do not conform with the applicable  
20 express warranties, service and repair shall be commenced within a reasonable  
21 time by the manufacturer or its representative.’” (*Gomez v. Volkswagen of Am.*  
22 (1985) 169 Cal.App.3d 921, 925 (1985), footnote omitted.)

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **III. BRIEF DESCRIPTION OF KEY EVIDENCE IN SUPPORT OF**  
 2 **PLAINTIFF'S CLAIMS**

3 **A. CLAIM 1: BMW NA breached the express warranties that**  
 4 **accompanied the sale of vehicle to Plaintiff, thereby violating the Act,**  
 5 **California Civil Code § 1790 et seq.**

6 Plaintiff will introduce the retail installment sales contract, which establishes  
 7 that Plaintiff purchased the vehicle that was distributed by BMW NA and also  
 8 established that the vehicle was sold with coverage of all warranties, making the  
 9 vehicle a “new motor vehicle” within the meaning of the statute. Plaintiff will  
 10 introduce the Owner’s Manual and Warranty Booklet which also establishes that  
 11 BMW NA gave written warranties to Plaintiff when she purchased the vehicle.

12 Plaintiff will introduce repair orders and related documentation created by  
 13 BMW NA’s authorized repair facilities and will provide testimony from Plaintiff,  
 14 her expert, and BMW NA’s authorized dealership personnel related to repairs and  
 15 repair opportunities given for Plaintiff’s vehicle to establish a reasonable number of  
 16 repair attempts made by BMW NA’s authorized repair facilities.

17 Plaintiff will introduce evidence, will testify herself, and will call her qualified  
 18 expert to testify that the vehicle had defect(s) covered by express warranties that  
 19 substantially impaired its use, value or safety to a reasonable person in Plaintiff’s  
 20 situation.

21 Plaintiff will also introduce evidence of recalls and service information  
 22 bulletins (“SIB”) that show BMW NA’s knowledge of defects in the vehicle.

23 Plaintiff will introduce evidence and qualified expert testimony that BMW  
 24 NA and its authorized repair facilities failed to repair the vehicle to match the written  
 25 warranty after a reasonable number of opportunities to do so. This testimony will  
 26 focus on the fact that various defects for which Plaintiff presented the vehicle for  
 27 repair continued to manifest and affect her usage, safety, and the value of the vehicle  
 28 after the repair visits.



1 Plaintiff will introduce evidence that the BMW NA failed to replace or buy  
 2 back the vehicle, including evidence and testimony of Plaintiff's contacts with BMW  
 3 NA and testimony proving that BMW NA did not comply with the Act and promptly  
 4 offer to repurchase or replace the vehicle when it qualified for such relief.

5 In support of her claim for civil penalties under the Act, Plaintiff will  
 6 introduce evidence that BMW NA knew of Plaintiff's presentations of the vehicle  
 7 for repairs, and yet still did not comply with its obligation to promptly repurchase  
 8 the vehicle when it qualified. Plaintiff will introduce evidence and provide testimony  
 9 from BMW NA's Person Most Knowledgeable about the history of Plaintiff's  
 10 contacts with BMW NA, and how BMW NA never offered to repurchase or replace  
 11 the vehicle, even when Plaintiff contacted BMW NA directly and requested such  
 12 relief. Plaintiff will also prove that BMW NA has established toothless protocols  
 13 with its dealerships with regards to repurchasing or replacing vehicles that qualify  
 14 under the Act. This evidence will show that BMW NA knew of its legal obligations  
 15 and intentionally failed to meet them.

16 **B. CLAIM 2: Defendant BMW NA breached the implied warranties**  
 17 **that accompanied the sale of the vehicle to Plaintiff, thereby violating the**  
 18 **Act, Civil Code § 1790 et seq.**

19 Plaintiff will introduce the retail installment sales contract, which establishes  
 20 that Plaintiff purchased the vehicle that was distributed by BMW NA.

21 Plaintiff will introduce evidence and testimony proving that at the time she  
 22 purchased the vehicle, BMW NA was in the business of distributing and selling the  
 23 vehicle through its authorized dealerships.

24 Plaintiff will introduce evidence and testimony that the vehicle was not of the  
 25 same quality as those generally acceptable in the trade and was not fit for the  
 26 ordinary purposes for which such goods are used. Plaintiff will introduce the repair  
 27 orders, Plaintiff's testimony regarding their issues of problems with the vehicle,  
 28 testimony from dealership personnel regarding the issues, repairs, and



1 documentation of work done, and expert testimony regarding the defects and repairs  
2 performed attempting to address those defects.

3 **C. CLAIM 3: BMW NA violated the Act at Civil Code section**  
4 **1793.2(b) by failing to repair the vehicle to conform to warranty within**  
5 **30 days.**

6 Plaintiff will present evidence that she purchased the vehicle and it was  
7 accompanied by written warranties as discussed above (admitting the sales contract  
8 and warranty booklet). Plaintiff will present the repair orders, which show the dates  
9 in and out when the dealership had possession of the vehicle to repair to show the  
10 total dates out of service for Plaintiff's vehicle, which equal more than 30 days.  
11 Plaintiff will testify, as will her expert, that the repairs effectuated at BMW NA's  
12 authorized repair facilities were not successful in fixing the defect, and Plaintiff  
13 continued to suffer from the same defect.

14 **IV. SUMMARY OF BMW NA'S AFFIRMATIVE DEFENSES**

15 Plaintiff does not know which affirmative defenses BMW NA plans to pursue  
16 at trial, but based on prior litigation experience, Plaintiff expects the following to be  
17 raised:

- 18 a) Second Affirmative Defense – Duration of Implied Warranty.
- 19 b) Third Affirmative Defense – Subject Vehicle Fit for its Intended Purpose.
- 20 c) Fifth Affirmative Defense – Unreasonable or Unauthorized Use
- 21 d) Sixth Affirmative Defense – Misuse, Abuse, Improper Maintenance

22 **V. BRIEF DESCRIPTION OF KEY EVIDENCE RELIED UPON IN**  
23 **OPPOSITION TO EACH AFFIRMATIVE DEFENSE**

24 **A. Second Affirmative Defense**

25 **1. Duration of Implied Warranty**

26 Plaintiff expects BMW NA will argue that the limits of the implied warranty  
27 claim is one year from purchase, and that the duration of the implied warranty bars  
28 an action when the purchaser fails to discover and report the defect to the seller

1 within the first year of ownership. California precedent disagrees.

2 Unless it is specifically disclaimed, every sale of a new motor vehicle in  
3 California includes an implied warranty by the manufacturer, distributor, or seller  
4 that the goods are merchantable under the Act. (Cal. Civ. Code, §§ 1791.3, 1792.)  
5 The duration of an implied warranty of merchantability is one year after the sale,  
6 unless a shorter period is stated in a writing that accompanies the consumer. (Cal.  
7 Civ. Code, § 1791.1, subd. (c); CACI No. 3212.)

8 A latent defect, undiscovered within the first year of ownership, can lead to  
9 a successful claim for breach of the implied warranty of merchantability.

10 In *Mexia v. Rinker Boat Co., Inc.*, 174 Cal.App.4th 1297 (2009), the Court of  
11 Appeal held that:

12 “...[T]he plain language of the statute, particularly in light of  
13 the consumer protection policies supporting the Song-  
14 Beverly Act, make clear that the statute merely creates a  
15 limited, prospective duration for the implied warranty of  
16 merchantability; **it does not create a deadline for**  
17 **discovering latent defects or for giving notice to the**  
18 **seller.**”

19 (*Id.* at 1301, emphasis added.)

20 The court acknowledged a “policy repeatedly expressed by the California  
21 courts of the need to construe the Song-Beverly Act so as to implement the  
22 legislative intent to expand consumer protection and remedies.” (*Id.* at 1311.) The  
23 court also held that the implied warranty is breached at the time of sale where the  
24 defect is latent and the purchaser is not obligated to either discover or report the  
25 breach within the one-year durational provision. (*Id.* at 1310-1311.)

26 In *Daniel v. Ford Motor Company*, 806 F.3d 1217, the U.S. Court of Appeals  
27 for the Ninth Circuit affirmed the *Mexia* decision, and held that the district court  
28 erred when it declined to follow *Mexia*. (*Daniel, supra*, 806 F.3d at 1223.)

1 Accordingly, BMW NA should be precluded from arguing that the one-year  
 2 duration of the implied warranty is anything other than what the *Mexia* court ruled  
 3 it to be. The one-year is not a limitation on when any latent defect need be discovered  
 4 or a limit on when the Plaintiff could have or should reported the defect to BMW  
 5 NA or its authorized repair facilities.

### 6 **B. Third Affirmative Defense**

7 Plaintiff anticipates that BMW NA will argue that it did not breach the  
 8 implied warranty of merchantability because Plaintiff could always drive the  
 9 vehicle. This is not the standard for breaching the implied warranty, and the Court  
 10 should preclude BMW NA from making this argument to the jury.

11 In *Brand v. Hyundai Motor America*, 226 Cal.App.4th 1538 (2014), the court  
 12 was faced with this same defense and clearly rebuked it:

13 “[Defendant] suggests ‘the implied warranty of  
 14 merchantability can be breached only if the vehicle  
 15 manifests a defect that is so basic it renders the vehicle  
 16 unfit for its ordinary purpose of providing transportation.’

17 **As the trial court correctly recognized, however, a**  
 18 **merchantable vehicle under the statute requires more**  
 19 **than the mere capability of ‘just getting from point “A”**  
 20 **to point “B.””**

21 (*Brand, supra*, 226 Cal.App.4th at 1546, emphasis added.)

22 Accordingly, BMW NA should be precluded from arguing that simply  
 23 because Plaintiff was able to drive the vehicle (or get from point “A” to point “B”),  
 24 the breach of implied warranty claim fails.

### 25 **C. Fifth Affirmative Defense**

26 This is a recognized affirmative defense for a Song-Beverly Act case. CACI  
 27 No. 3220 describes the elements, but really all that is required is that there was  
 28 “unauthorized or unreasonable use of the vehicle after it was sold.”

1 The Act itself is vague about what constitutes “unauthorized or unreasonable  
 2 use of the vehicle.” However, what is clear is that Plaintiff does not have the burden  
 3 to disprove that any defects were not caused by unreasonable use in order to recover  
 4 under the Act; rather the defendant has the burden to prove this affirmative defense.  
 5 (*Jones v. Credit Auto Center, Inc.*, 237 Cal.App.4th Supp. 1 (2015).)

6 First, there is no evidence that Plaintiff used the vehicle in any unreasonable  
 7 or unauthorized way. In support of Plaintiff’s position that the defects were not  
 8 caused by unreasonable or unauthorized use, Plaintiff will testify (as she did in her  
 9 deposition) that she did not have a trailer hitch on the car (56:18-19), she never  
 10 drove the vehicle more than 100 miles from her home (56:20-57:4), she never  
 11 opened the hood of her vehicle (15:9-12), she did not let her parents or brother work  
 12 on the vehicle (15:13-15), and she only used the vehicle for personal and family  
 13 purposes and to commute to work (30:18-31:1). Further, there is no evidence in the  
 14 repair orders that any defect for which Plaintiff brought in her vehicle was caused  
 15 by unreasonable or unauthorized use. According to BMW NA’s own  
 16 documentation, BMW NA’s authorized repair facilities made ten repairs to  
 17 Plaintiff’s vehicle under the warranty, and no repairs for “goodwill” or “customer  
 18 pay,” which would be the classification if a defect was caused by Plaintiff’s actions.

19 Accordingly, there is no evidence to support this affirmative defense and  
 20 BMW NA should be required to make an offer of proof before arguing this  
 21 affirmative defense to the jury.

#### 22 **D. Sixth Affirmative Defense**

23 This is not a recognized affirmative defense for a Song-Beverly Act case.  
 24 CACI No. 3220, as described above, is the closest jury instruction on point.

25 Similar to BMW NA’s Fifth Affirmative Defense, there is no evidence to  
 26 support this affirmative defense. There is no evidence that any defect presented on  
 27 any repair visit Plaintiff made to a BMW NA authorized repair facility was caused  
 28 by misuse, abuse, or a lack of maintenance. BMW NA’s technicians are trained to

1 look for such failure to maintain, to ensure BMW NA's warranty is only used to  
 2 pay for qualifying defects. If any defect had been tied to lack of maintenance, abuse,  
 3 or misuse, either Plaintiff would have had to pay for the repair or the dealership  
 4 would have covered it as "goodwill." As discussed above, BMW NA's documents  
 5 show no repair was ever paid by the customer (other than maintenance) and no  
 6 repair was ever paid by the dealership as "goodwill."

7 Accordingly, there is no evidence to support this affirmative defense and  
 8 BMW NA should be required to make an offer of proof before arguing this  
 9 affirmative defense to the jury.

## 10 **VII. ANTICIPATED EVIDENTIARY ISSUES**

11 Plaintiff anticipates two evidentiary issues will arise during trial: (1) BMW  
 12 NA's Affirmative Duty and (2) Incidental and Consequential Damages.

### 13 **A. BMW NA's Affirmative Duty.**

14 Plaintiff anticipates the parties will disagree on BMW NA's burden to  
 15 promptly offer to repurchase or replace Plaintiff's vehicle. Plaintiff will suggest a  
 16 special jury instruction regarding what California caselaw has deemed to be BMW  
 17 NA's affirmative duty to reach out to Plaintiff and offer to repurchase or replace her  
 18 vehicle, and BMW NA will likely object.

19 The Act states:

20 "If the manufacturer or its representative in this state is unable  
 21 to service or repair a new motor vehicle . . . to conform to the  
 22 applicable express warranties after a reasonable number of  
 23 attempts, the manufacturer shall either promptly replace the  
 24 new motor vehicle . . . or promptly make restitution to the  
 25 buyer. . ."

26 (Civ. Code, § 1793.2, subd. (d)(2).) The statute does not require that a consumer  
 27 request the manufacturer replace the vehicle in order to trigger the manufacturer's  
 28 duty. Rather, the manufacturer's duty is affirmative. In *Krotin v. Porsche Cars North*

1 *America, Inc.* 38 Cal.App.4th 294 (1995), the court considered whether a consumer  
 2 must revoke acceptance of a car within a reasonable time. One of the arguments  
 3 raised to the court went as follows:

4 . . . [T]he consumer must be under a duty to notify the  
 5 manufacturer in a reasonable and timely manner of the need for  
 6 such action. Otherwise, the argument goes, the manufacturer  
 7 would have to become ‘clairvoyant’ with respect to  
 8 acknowledging and responding to otherwise unknown claims  
 9 by consumers. However, as previously discussed, the Act does  
 10 not require consumers to take any affirmative steps to secure  
 11 relief for the failure of a manufacturer to service or repair a  
 12 vehicle to conform to applicable warranties other than, of  
 13 course, permitting the manufacturer a reasonable opportunity  
 14 to repair the vehicle. . . . In reality, as indicated by the facts  
 15 alleged at trial by the Krotins, the manufacturer seldom on its  
 16 own initiative offers the consumer the options available under  
 17 the Act: a replacement vehicle or restitution. Therefore, as a  
 18 practical matter, the consumer will likely request replacement  
 19 or restitution. But the consumer’s request is not mandated by  
 20 any provision of the Act. Rather, the consumer’s request for  
 21 replacement or restitution is often prompted by the  
 22 manufacturer’s unforthright approach and stonewalling of  
 23 fundamental warranty problems.

24 (*Krotin*, 38 Cal.App.4th at pp. 302-303, emphasis added.)

25 The *Krotin* court recognized that manufacturers have access to the  
 26 information needed to determine whether vehicles are lemons without a consumer’s  
 27 specific request for relief.

28 An automobile manufacturer need not read minds to determine  
 which vehicles are defective; it need only read its dealers’  
service records. The Act requires the manufacturer to maintain  
 or to designate and authorize service and repair facilities in the  
 state (Civ. Code, § 1793.2, subd. (a)(1)(A)); i.e., usually,  
 automobile dealerships with service departments. As indicated  
 by the facts in the present case, where a district service

1 manager from Porsche ultimately obtained copies of service  
 2 records from various dealerships to prepare, as she termed it,  
 3 "a lemon law summary analysis," a manufacturer is capable of  
 4 becoming aware of every failed repair attempt. Computerized  
 5 recordkeeping at dealership service departments could easily  
 6 facilitate this task, even without any direct contact from the  
 7 consumer to the manufacturer or any request for replacement  
 8 or reimbursement to the dealership. It is thus apparent that a  
 9 manufacturer need not be "clairvoyant"; it need only  
 10 demonstrate more initiative in honoring warranties.

11 (*Id.* at p. 303, emphasis added.) The *Krotin* court concluded:

12 The manufacturer has an affirmative duty to replace a vehicle  
 13 or make restitution to the buyer if the manufacturer is unable  
 14 to repair the new vehicle after a reasonable number of repair  
 15 attempts, and the buyer need not reject or revoke acceptance of  
 16 the vehicle at any time. The buyer need only provide the  
 17 manufacturer with a reasonable opportunity to fix the vehicle.  
 18 Accordingly, the jury instruction [the lessee] complained of  
 19 which required the lessee in the present case to reject or revoke  
 20 acceptance within a reasonable time was error.

21 (*Id.* at p. 303, emphasis added.) *Krotin* was later quoted with approval by the Court  
 22 of Appeal in *Lukather v. General Motors, LLC*, 181 Cal.App.4th 1041, 1050-1052  
 23 (2010) (willfulness established because GM knew or should have known from dealer  
 24 information that vehicle was a lemon, yet did not act in good faith to provide remedy  
 25 for months). These cases plainly hold, without contradiction, that the Act places no  
 26 requirement upon a consumer to request that a manufacturer repurchase or replace a  
 27 defective vehicle, but rather that the manufacturer has an affirmative duty to offer  
 28 the same when it becomes apparent that nonconformities have not been repaired  
 within a reasonable number of attempts.

Accordingly, Plaintiff will request a special jury instruction telling the jury  
 that Plaintiff never had a duty to request repurchase or replacement. This is done to



1 tell the jury that BMW NA’s duty to “promptly repurchase or replace the vehicle”  
 2 (CACI No. 3201) is not tied to whether the Plaintiff ever contacts BMW NA directly  
 3 to request such relief. This element is directly relevant to Plaintiff’s claim for  
 4 restitution under her breach of express warranty claim and her request for civil  
 5 penalties. In order to recover civil penalties, Plaintiff has to prove that BMW NA  
 6 knew of its legal obligations and intentionally declined to fulfill them. (CACI No.  
 7 3244.) To fully decide this point, the jury should know that BMW NA always has  
 8 an affirmative duty to promptly repurchase or replace qualifying vehicles, and  
 9 Plaintiff has no duty to promptly request such relief.

#### 10 **B. Incidental and Consequential Damages**

11 Plaintiff anticipates the parties will disagree on the categories of damages  
 12 claimed by Plaintiff as incidental and consequential damages. Plaintiff will request  
 13 to be reimbursed for maintenance, tires, DMV registration, insurance premiums, and  
 14 other costs paid for the vehicle. BMW NA will likely object. This court dealt with  
 15 this same issue when it decided BMW NA’s Motion for New Trial in *Ruiz v. BMW*  
 16 *of North America, LLC* (2018 WL 2016454), but Plaintiff renews her arguments  
 17 here.

18 The statutory scheme governing incidental and consequential damages  
 19 requires tracking the Act from Civil Code section 1793.2, subd. (d)(2)(B), to Civil  
 20 Code section 1794, and finally to Commercial Code section 2715.

21 Consider the following: Under the Act, if a manufacturer is unable to repair  
 22 its vehicle after a reasonable number of attempts, it shall either replace the vehicle  
 23 or make restitution to the buyer. (Civ. Code §1793.2, subd. (d)(2).) This restitution  
 24 includes “the actual price paid or payable by the buyer,” including “any collateral  
 25 charges such as sales or use tax, license fees, registration fees, and other official fees,  
 26 **plus any incidental damages to which the buyer is entitled under Section 1794.**”  
 27 (Civ. Code §1793.2, subd. (d)(2)(B), emphasis added.)

Further, Civil Code section 1794 incorporates the Commercial Code’s definitions of incidental and consequential damages—namely, defining such damages as “expenses reasonably incurred in inspection, receipt, transportation and **care and custody of goods** rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense **incident to the delay or other breach**” as well as “any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.” (Comm. Code, §§ 2714, 2715, emphasis added; see Directions for Use for CACI 3242 and 3243 (citing Commercial Code section 2715).)

In addition, Commercial Code section 2715 features the word “include” twice. (See § 2715, subds. (1) & (2).) Black’s Law Dictionary defines “include” as “to contain as a part of something.” (Black’s Law Dictionary, 10th ed. 2014.) Accordingly, the list of expenses in Commercial Code section 2715, subd. (1) is not an exhaustive list, but rather is merely part of a list of possible expenses. Moreover, the Restatement of Contracts indicates consequential losses “include such items as injury to person or property resulting from defective performance.” Restatement (Second) of Contracts § 347 (Am. Law Inst. 1981).” (*San Diego Gas & Elec. Co. v. ABB, Inc.*, No. 15CV605-MMA (KSC), 2016 WL 6680205, at \*5 (analyzes subd. 2(b) only.) Consistent with this definition, “section 2715 defines incidental and consequential damages, the latter including ‘(a)ny loss resulting from... particular requirements... of which the seller at the time of contracting had reason to know...’” (*S.M. Wilson & Co. v. Smith Int’l, Inc.*, 587 F.2d 1363, 1373 (9th Cir. 1978) (analyzes subd. 2(a) only.)

In contrast to the broadly-worded provisions describing what a consumer is entitled to recover, subparagraphs (A) through (C) of section 1793.2 strictly limit the allowable deductions to an *offset for use* calculated pursuant to the formula in

1 subparagraph (C), and “*nonmanufacturer items* installed by a dealer or the buyer”  
 2 as provided above. These are the only deductions allowed from the “actual price paid  
 3 or payable by the buyer.”

4 In sum, statutory restitution is broad, allowing for “any other charges” along  
 5 with incidental damages under the Commercial Code, whereas deductions are  
 6 strictly enumerated. The Court must give effect to these Legislative decisions.

7 Principles of construction, including *ejusdem generis* and *expresio unius est*  
 8 *exclusio alterius*, prohibit the Court from reading additional deductions into the  
 9 statute without controlling authority. “[I]f statutory language is ‘clear and  
 10 unambiguous there is no need for construction and courts should not indulge in it.’  
 11 Unless defendants can demonstrate that the natural and customary import of the  
 12 statute’s language is either ‘repugnant to the general purview of the act,’ or for some  
 13 other compelling reason, should be disregarded, this court must give effect to the  
 14 statute’s ‘plain meaning.’” (*Tiernan v. Trustees of Cal. St. Univ.*, 33 Cal.3d 211, 218-  
 15 219 (1982), citations omitted.)

16 Judicial interpretation should promote rather than defect the general purpose  
 17 or policy of statute and should not be construed so as to nullify the will of the  
 18 legislature or cause the law to come into conflict with the apparent purpose the  
 19 lawmakers had in view. (*Smith v. Sup. Ct.*, 39 Cal.4th 77 (2006); *California Sch.*  
 20 *Employees Assn. v. Jefferson Elementary Sch. Dist.*, 45 Cal.App.3d 683 (1st. Dist.  
 21 1975).)

22 This tracking through the statutes is confirmed by this Court’s order in the  
 23 case of *Ruiz v. BMW of North America, LLC* (2018 WL 2016454), where the Court  
 24 ultimately determined that incidental and consequential damages *are* statutorily  
 25 recoverable, and upheld the jury’s verdict awarding DMV registrations, insurance  
 26 premiums, Lyft charges, tire charges, and maintenance charges. The *Ruiz* order, in  
 27 denying the Defendant’s motion for a new trial that included an argument that  
 28

1 incidental and consequential damages awarded in that case were contrary to the law,  
2 stated, in relevant part:

3 The [Song-Beverly] Act allows for recovery of “charges for  
4 transportation...[,]any collateral charges such as sales or use tax,  
5 license fees, registration fees, and other official fees, plus any  
6 incidental damages to which the buyer is entitled under Section 1794,  
7 including, but not limited to, reasonable repair, towing, and rental car  
8 costs actually incurred by the buyer.” Cal. Civ. Code §  
9 1793.2(d)(2)(B). Section 1794 incorporates definitions of incidental  
and consequential damages from California Commercial Code  
section 2715:

10 (1) Incidental damages resulting from the seller’s breach include  
11 expenses reasonably incurred in inspection, receipt, transportation  
12 and care and custody of goods rightfully rejected, any commercially  
13 reasonable charges, expenses or commissions in connection with  
14 effecting cover and any other reasonable expense incident to the  
delay or other breach.

15 (2) Consequential damages resulting from the seller’s breach include  
16 (a) Any loss resulting from general or particular requirements and  
17 needs of which the seller at the time of contracting had reason to  
18 know and which could not reasonably be

19 prevented by cover or otherwise. Cal. Com. Code § 2715.

20 The plain language of the statute taken with its remedial purpose  
21 supports the Ruizes’s interpretation of the incidental and  
22 consequential damages that are recoverable. See Murillo, 17 Cal.4th  
23 at 990 (holding the Act should be interpreted to support its remedial  
purpose).

24 *Ruiz v. BMW of North America, LLC*, 2018 WL 2016454.

25  
26 BMW NA will likely cite to *Kirzhner v. Mercedes-Benz USA LLC*, 18  
27 Cal.App.5th 453 (2017) as a blanket ruling disallowing awarding the specific  
28 incidental and consequential damages Plaintiff seeks in this case. Again, this Court’s

1 order denying BMW's Motion for New Trial dealt with this argument, stating,  
 2 "Kirzhner has no precedential effect during the time it is awaiting review by the  
 3 California Supreme Court. Cal. R. Ct. 8.1115(e)(1) ("Pending review and filing of  
 4 the Supreme Court's opinion...a published opinion of a Court of Appeal in the matter  
 5 has no binding or precedential effect, and may be cited for potentially persuasive  
 6 value only. Any citation to the Court of Appeal opinion must also note the grant of  
 7 review and any subsequent action by the Supreme Court.").

8 Accordingly, Plaintiff should be able to request maintenance, tires, DMV  
 9 registration, and insurance premiums for the vehicle as incidental and consequential  
 10 damages. It will be up to the jury to decide whether, based on the elements of CACI  
 11 Nos. 3242 and 3243, to award Plaintiff these costs.

## 12 **VIII. BIFURCATION OF ISSUES**

13 Plaintiff does not request any bifurcation of issues.

## 14 **IX. JURY TRIAL**

15 Plaintiff has requested a jury trial.

## 16 **X. ATTORNEYS' FEES**

17 The Act provides that a prevailing plaintiff shall recover attorney's fees and  
 18 costs. Civ. Code §1794, subd. (d). Under this section, fees awarded are to be based  
 19 on "actual time expended." In *Drouin v. Fleetwood Enterprises* (1985) 163  
 20 Cal.App.3d 486, 493, the Court described such attorney's fees provisions as follows:

21 It should be noted that an attorney's fee is to be based upon  
 22 actual time expended rather than being tied to a percentage of  
 23 the recovery. This requirement is designed to make the  
 24 pursuit of consumer rights involving inexpensive consumer  
 products economically feasible.

25 In this case, when Plaintiff prevails on her claim, Plaintiff will petition the  
 26 Court for an award of reasonable attorney's fees and costs of suit.

## 27 **XI. ABANDONMENT OF ISSUES**

28 Plaintiff do not abandon any additional claims against BMW NA.

1  
2 DATED: October 9, 2018

Respectfully Submitted,  
3  
4 **WIRTZ LAW APC**

5 By: /s/ Amy R. Smith  
6 Richard M. Wirtz  
7 Amy R. Smith  
8 Attorneys for Plaintiff  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28